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IN THE

Supreme Court of the United States

OCTOBER TERM, 1955.

No. 822

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC. and MONTGOMERY WARD & CO., INC.,
Respondents.

HONORABLE WALTER J. LA BUY,
Petitioner,

vs.

HOWES LEATHER COMPANY, INC.,
Respondent.

PETITIONER'S REPLY BRIEF IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI.

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The Schaffer Press Inc.—ANdover 3-6850

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ARGUMENT.

Respondents' brief in opposition ignores rather than answers the reasons advanced by petitioner in support of the petition for a writ of certiorari. The points urged are without merit.

1. There is a true conflict between the holding of the Court below and the decision of the First Circuit in *Narragansett Pier Amusement Co.*, 224 F. 2d. 231 (C. A. 1, 1955), *cert. den.*, 76 S. Ct. 103. The opinion of the First Circuit in *Narragansett* and its prior holdings referred to in that case (See *e. g., In re Josephson*, 218 F.

2d 174) make clear that its construction of the "All Writs Act" is in direct conflict with the "roving commission" to correct any erroneous decision or abuse of discretion which the Court below thought was conferred upon it by that Act. Respondents point to that portion of the First Circuit's opinion in *Narragansett* in which it said that "no exceptional circumstances" were present which would "render it appropriate" to grant the writ of mandamus. This phrase, "exceptional circumstances," is merely a short-hand expression employed by the First Circuit to say that jurisdictional power is not conferred by the "All Writs Act" to hear and determine this class of cases, since they do not tend to impede or frustrate the Court's eventual appellate jurisdiction. The prior First Circuit cases, expressly relied on in *Narragansett*, make this wholly clear.

2. Contrary to respondents' contention, *McCullough* v. *Cosgrave*, 309 U. S. 634 (1940), does not hold that a court of appeals has power to issue a writ of mandamus to revoke a reference to a master. *McCullough* involved only the issuance of an original writ of mandamus in which the jurisdiction of this Court was invoked pursuant to Section 234 of the Judicial Code of 1911 (36 Stat. 1156) which expressly conferred jurisdiction on this Court to entertain such writs. This Section reads as follows:

> "The Supreme Court shall have power to issue . . . writs of mandamus, in cases warranted by the principles and usages of law, to any courts appointed under the authority of the United States . . . ."

This section (which was subsequently repealed) contrasts with Section 14 of the Judiciary Act of 1789 (1 Stat. 81) empowering Courts of Appeal and District Courts, as well as the Supreme Court, to issue "all other

writs not specifically provided for by statute, *which may be necessary for the exercise of their respective jurisdictions*, and agreeable to the principles and usages of law." (Emphasis added) It was this latter section which was re-enacted without substantial change as Section 262 of the Judicial Code of 1911 and finally, in 1948, as the present "All Writs Act", 28 U.S.C. §1651(a); and it is this latter section upon which the Court below necessarily relied.

The issuance of the original writ of mandamus (by this Court) in *McCullough* was thus based on a statute which conferred on this Court a general supervisory power over the inferior federal courts. By contrast, the statutory authority conferred on the Courts of Appeal and now embodied in the "All Writs Act" was confined to the issuance of extraordinary writs only in aid of their appellate jurisdiction. The historical evolution of the "All Writs Act", and the decisive distinction between the general supervisory power originally conferred on the Supreme Court and in existence in 1940 when *McCullough* was decided, with the limited power conferred on the Courts of Appeal, is fully reviewed by the First Circuit in the case of *In re Josephson*, 218 F. 2d 174, 176-180 (CA 1, 1954). Reliance upon *McCullough* to sustain the decision of the Court below is thus wholly misplaced, and ignores as well the most recent expressions of this Court on the limits of judicial power conferred on the Courts of Appeal to entertain and issue extraordinary writs. (See *e.g.*, *Bankers Life and Casualty Co.* v. *Holland*, 346 U.S. 379).

3. On the merits, respondents have nothing to say in support of the arbitrary interference by the Court of Appeals with a properly entered discretionary order of the lower court referring the cases in question to a master. Particularly respondents are unable to show what scope

is left to Rule 53(b) in non-jury matters if the present references are erroneous. What is the "exceptional" non-jury case which may be referred? To this question properly raised by the dissenting judge below, respondents have no answer. We submit (as did the judge dissenting below) that the decision in this case nullifying Section 53(b) was reached only because *McCullough* was misconstrued. (See Pet. pp. 15-17.))

This Court should issue a writ of certiorari to clarify which of the several differing interpretations of *McCullough*, reached by courts and legal commentators, is correct (See Pet. p. 16).

CONCLUSION.

The issues presented for review are of importance in the administration of justice in the federal courts. Furthermore, a conflict exists between the First Circuit and the Court below. For these reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

THE HONORABLE WALTER J. LA BUY,
United States District Judge,

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